July 31. 1746.

ANSWERS

FOR

JAMES GRIERSON late in *Auchinreoch*,

TO

The PETITION of William Ireland.

WILLIAM IRELAND the Petitioner, and *William Ireland* younger his Son, by their heritable Bond bearing Date the 30th of *July* 1733, granted them to have borrowed, and therefore obliged themſelves conjunctly and ſeverally to repay to the Reſpondent, 1700 Merks *Scots*, with Annualrent, Penalty and termly Failzies, and in further Security of the aforeſaid Sum, to infeft the Reſpondent in an Annualrent correſponding thereto, but Prejudice to the Reſpondent to ſuit and uſe all Manner of Execution, real or perſonal, for the above mentioned Sum, without any previous Requiſition to be uſed by them for that Effect, ſo that the uſing ſuch Diligence ſhould nowiſe infringe or invalidate the heritable Security, and Infeftment to follow thereon; providing and declaring, that the aforeſaid Annualrent ſhould be redeemable by the ſaid *William Ireland* eldet and younger, at any Term of *Whitſunday* or *Martinmas*, by Payment or Conſignation of the aforeſaid principal Sum, Annualrents and termly Failzies, if incurred, upon Premonition always of forty Days before ſuch Term.

It appears from the Tenor of this heritable Bond, that the Granters were not themſelves infeft at that Time in the Lands of *Upper* and *Nether-Caldow*, over which the aforeſaid Security was intended to be granted, as they thereby became bound to procure themſelves entred and infeft, and being ſo entred, to infeft and ſeaſe the Reſpondent; ſo that the Precept of Saſine contained in this heritable Bond could give no Security for the above mentioned Sum; and upon Enquiry it was found, that theſe Lands had come to the Petitioner by Succeſſion to his Uncle, to whom he had connected no Title.

It appears that the Petitioner, in his Son *William Ireland* younger's Contract of Marriage, did diſpone theſe Lands of *Upper* and *Nether-Caldow* to the aforeſaid *William Ireland* younger, reſerving his own Liferent of a Part of theſe Lands; and it may alſo be true, that the aforeſaid Diſpoſition is granted with the Burden of Debts.

This Bond, upon which no Infeftment could be taken, for the Reaſons above mentioned, being regiſtrate in the Stewart-court Books of *Kirkcudbright*, Horning was thereupon raiſed in the Year 1737, by virtue of which both Father and Son were charged upon the perſonal Obligement therein contained.

In the Year 1738, the Reſpondent was induced to advance a further Sum of 300 Merks to *William Ireland* younger, upon his own perſonal Bond; ſo that the Reſpondent was at the ſame time Creditor to *William Ireland* elder and younger in the firſt mentioned Bond of 1700 Merks, and to *William Ireland* younger in the other Bond above mentioned for 300 Merks.

Of even Date with the laſt mentioned Bond for 300 Merks, the Reſpondent obtained a Tack from *William Ireland* younger, of the Lands of *Upper-Caldow*, for the Space of nine Years, from *Whitſunday* 1738, for Payment of the yearly Tack-duty of 110 Merks, and it is thereby ſpecially provided, "That even, after "Elapſe of the ſaid nine Years, the Reſpondent ſhould be entitled to retain Poſſeſſi-

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" on of the aforeſaid Lands of *Upper-Caldow*, ay and while he ſhould be repaid, " not only of the 300 Merks and Annualrents thereof, contained in the laſt menti- " oned Bond by *William Ireland* younger, but alſo of the 1700 Merks in the firſt " mentioned heritable Bond;" and, by another Clauſe in this Tack, a Faculty is granted to the Reſpondent of retaining the Annualrents of the whole 2000 Merks out of the firſt and readieſt of each Term's Rent: And as it had been provided by an expreſs Clauſe in the aforeſaid heritable Bond itſelf, that Premonition ſhould be made forty Days before Payment, the like Clauſe is repeated in the above mentioned Tack by *William Ireland* younger, a very reaſonable Precaution on the Part of the Reſpondent, That in caſe he ſhould incline to let this Sum continue in the Hands of the Debitors, it ſhould not be paid at an Unawares, but upon a reaſonable Premonition, that another Hand might be provided.

And here it is proper to obſerve, That *William Ireland* elder, the Petitioner, was no Party to the aforeſaid Tranſaction with *William Ireland* younger; he had *ab ante* diſponed theſe Lands of *Upper* and *Nether-Caldow* to his Son; he was no Party to the 300 Merks Bond, or to the Tack of the Lands of *Upper-Caldow*, which *William Ireland* younger had granted to the Reſpondent; and therefore, whatever Claim of Relief he might have againſt his Son, he remained bound to the Reſpondent for the above mentioned Sum of 1700 Merks, in Terms of the above mentioned heritable Bond for that Sum, and was neither benefited nor prejudged by the ſubſequent Agreement betwixt the Reſpondent and *William Ireland* younger, when the other Sum of 300 Merks was borrowed by *William Ireland* younger, and the above mentioned Tack of the Lands of *Upper-Caldow* granted.

William Ireland younger died ſoon after granting of the aforeſaid Tack, leaving Iſſue one Infant Son, to whom theſe Lands of *Upper* and *Nether-Caldows* did therefore belong, in virtue of the aforeſaid Diſpoſition by the Petitioner in his Son's Contract of Marriage; and as *William Ireland* younger had contracted conſiderable Debts, for which there was no other Fund of Payment but theſe very Lands of *Upper* and *Nether-Caldows*, it would appear that *William Ireland* elder, meaning to take Advantage of his Grandchild's Infancy, and to cut out the Son's Creditors, fell upon this Device, of granting a fictitious Bond to his Confident *Neilſon* of *Corſack*, for no leſs a Sum than 600 *l. Sterling*, which is the full Value of the Lands, payable in four Days after the Date of the Bond, in order to be the Foundation of an immediate Adjudication of theſe Lands, whereupon *Corſack*, being firſt infeft, before any Infeftment could be expede upon the former Diſpoſition to *William Ireland* younger, might thereby acquire the firſt and preferable real Right to theſe Lands.

This Scheme was forthwith carried into Execution. The Bond is granted for 600 *l. Sterling*, of Date the 11th of *May* 1742, payable at the *Whitſunday* thereafter, *Corſack* thereupon raiſes and executes Letters of ſpecial Charge againſt the Petitioner, as charged to enter Heir to his Uncle, and thereupon, in that ſame Year 1742, obtains Decreet of Adjudication of theſe Lands, and having thereupon expede a Charter under the Great Seal, obtained himſelf to be infeft for a Sum, which, if juſtly due, was equal in Value to the Property of the Lands, and was the preferable Security, as having thereby obtained the firſt real Right, calculated for no other Purpoſe but to exclude the Reſpondent's heritable Bond, upon which no Infeftment could be taken, for the Reaſons above mentioned, the Diſpoſition to theſe Lands, which had been granted to *William Ireland* younger, and, of conſequence, to exclude the Intereſt of the Infant Grandſon, and of the Son's Creditors.

The firſt Notice that the Reſpondent had of theſe Proceedings was by *Corſack*'s publick Infeftment, by which the Reſpondent was greatly alarmed. The above mentioned Sums which he had lent out, truſting to the aforeſaid Securities, was the greateſt Part of his ſmall Fortune. He expoſtulated this Matter with the Petitioner, tho' without Succeſs, and coming to underſtand that this was all a Contrivance betwixt the Petitioner and *Corſack*, to cut out the Son's Creditors, and amongſt theſe the Reſpondent, he was adviſed to proceed in Diligence againſt the Petitioner upon the above mentioned Bond of 1700 Merks, and thereupon cauſed incarcerate the Petitioner upon a Caption then raiſed, in conſequence of the Letters of Horning and Charge thereon, which had been formerly given. The only View he had in proſecuting

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this Diligence was to ſecure his Payment, which, he had but too good Reaſon to apprehend, was intended to be fruſtrated by this colluſive Management betwixt the Petitioner and *Corſack*; ſo that it is highly injurious in the Petitioner to pretend, that the Reſpondent had thereby in view to compel the Petitioner to ſell theſe Lands to him at an Under-value: The Petitioner had no Power to ſell them; they were not his, having *ab ante* diſponed them to his Son: So that whatever the Petitioner's Views were in Concert with *Corſack*, it muſt have been the Height of Folly in the Reſpondent to have joined in that Concert, the manifeſt Purpoſe of which was to fruſtrate the Right, which had *ab ante* been granted to the Son, and ſo to cut out the Son's Creditors.

After that the Petitioner had been detained for ſome little Time in Priſon, the Reſpondent was prevailed upon, by the Interceſſion of Friends, to conſent to his Liberation, and was ſo good-natured as even to pay out of his own Pocket the Priſon Dues; and ſo little Notion had the Petitioner then of any Ground of Complaint upon account of this Diligence, that he neither applied for Liberation, nor took any Proteſt for wrongous Impriſonment, but went out of Priſon with great Satisfaction, and repeated Acknowledgments of the Reſpondent's having dealt with him in the gentleſt Manner.

Being thus ſet at Liberty, he was inſtigated by *Corſack* to preſent a Bill of Suſpenſion, or which is truly the Fact, to allow *Corſack* to uſe his Name in a Bill of Suſpenſion of the above-mentioned heritable Bond, in diſcuſſing of which Suſpenſion before the Lord *Elchies* Ordinary, there was repeated a Summons of wrongous Impriſonment and Oppreſſion, in reſpect as was alledged, that he was not only charged, but actually booked for the principal Sum and whole Annualrents contained in the firſt mentioned Bond of 1700 Merks, notwithſtanding that the Reſpondent had retained the current Annualrents of that Sum out of the Tack-duty payable to *Caldow* younger, one of the joint Obligants in that Bond; and therefore claimed, that whatever Sum he ſhould be found entitled to in name of Damages and Expences on account of the aforeſaid wrongous Impriſonment, ſhould compenſate *pro tanto* the Sums charged for.

A Litigation having thereupon enſued before the Lord Ordinary, whether the Petitioner had been charged and booked for the whole Annualrents of this principal Sum, as if no Part thereof had been paid or retained, or only in general, for ſuch of theſe Annualrents as were truly due. And, *2dly*, Whether theſe whole Annualrents had been retained out of the Tack-duty, or if ſome Part of theſe Tack-duties had been paid up without retaining the Annualrents, a Diligence was granted to the Petitioner, and renewed from Time to Time, with uncommon Indulgence, for recovering Documents in Writ to prove that the whole of theſe Annualrents had been diſcharged, by Means of which, as the Reſpondent was precluded from recovering Payment of his juſt Debt, though there lay no juſt Exception to the Debt itſelf of 1700 Merks, further than as the Petitioner, upon his illiquid Claim of Damages meant to compenſate the ſame *pro tanto*, in the Event of his prevailing in the repeated Proceſs of Oppreſſion, the Lord Ordinary was at length pleaſed to pronounce the ſeveral Interlocutors which are now the Subject of this reclaiming Petition.

In the Entry, and in order to ſatisfy your Lordſhips with what Views the aforeſaid fictitious Claim was reared up in the Perſon of *Corſack*, followed out by a Decreet of Adjudication, Charter and Infeftment under the Great Seal, which the Reſpondent has already ſaid was deviſed with an Intention to diſappoint the former Diſpoſition of theſe Lands to *William Ireland* younger, and to cut out the Son's Creditors, it is proper to obſerve, that not only in the Bill of Suſpenſion, but in the Proceedings before the Lord Ordinary, the Petitioner did ſo far preſume as once and again judicially to aver, that he himſelf was the Granter of the above mentioned Tack of the Lands of *Upper-Caldow*; it was provided by an expreſs Clauſe in the aforeſaid Tack, that forty Days Premonition ſhould be given by *William Ireland* younger, before he intended to pay the aggregate Sum of 2000 Merks, in which he was Debitor to the Reſpondent. It occurred to the Petitioner, that this Clauſe, by a very ingenious Conſtruction, ſhould ty up the Hands of the Creditor, ſo that as no Diligence could be uſed for Payment of theſe Sums, but upon the like previous Requiſition

quiſition of forty Days; and therefore, to entitle himſelf to the Benefit of this Clauſe in a Tack to which he was no Party, he did not ſcruple to aver that he himſelf was the Granter of that Tack, becauſe it happened that his Son the real Granter of the Tack carried the ſame Name; ſo that it might apply to either.

When beat out of this Falſhood, he run into the other Extreme, equally falſe, and judicially averred that his Son *William Ireland* younger did not long ſurvive the granting of this Tack, and died without Iſſue, whereby the Eſtate reverted to him, though it was notourly known that *William Ireland* younger had left an Infant Son, who was then alive. This bold Allegation obliged the Reſpondent to procure Certificates and Declarations of the Grandſon's Birth and Exiſtence. Theſe Particulars the Reſpondent does admit are no otherwiſe material to the Point now in Iſſue, than as they tend to juſtify the Lord Ordinary's Interlocutor, who juſtly was of Opinion, that as no Objection was offered to the Debt itſelf of 1700 Merks, it was not reaſonable, eſpecially under the Circumſtances of this Caſe, that that Debt ſhould remain under Suſpenſion, until the Event of the Petitioner's illiquid Claim upon the Proceſs of wrongous Impriſonment, whilſt in the mean Time thoſe Lands of *Upper* and *Nether-Caldow*, intended for Security of this Sum, were in Appearance ſwallowed up by *Corſack*'s Diligence, with whom the Reſpondent muſt probably have a freſh Diſpute before he could have Acceſs to recover his Money out of theſe Lands.

The Petitioner is forced to admit, that by Virtue of the aforeſaid Clauſe in the above mentioned Tack, the Reſpondent is entitled to retain Poſſeſſion of the Lands of *Upper-Caldow*, even after Expiry of the nine Years, until he ſhall be removed by due Courſe of Law. And, *2dly*, That notwithſtanding of the Poſſeſſion's being ſo retained, he may demand Payment of the Sum in the heritable Bond: But then he inſiſts, that as by the aforeſaid Clauſe, forty Days Premonition was requiſite to be made by *Caldow* younger before Payment or Conſignation of that Sum, it was neceſſarily implied that Requiſition upon the like Number of Days ſhould be made before that the Creditor could proceed to Diligence, which the Reſpondent will be forgiven to ſay is ſo much above his Comprehenſion, that he does not chuſe to trouble your Lordſhips with many Words in refuting an Argument which muſt needs fall to the Ground by its own Weight. It was extremely reaſonable for the Creditor to ſtipulate that this Sum ſhould not be thrown in his Hand unawares, and as Parties did agree upon a Premonition of 40 Days for that Purpoſe without ſtipulating the like *Induciæ* for Requiſition to be made by the Creditor, it is abſurd to argue that the one is included in the other. There is nothing more common in Contracts of Wadſet, which this heritable Bond does reſemble, than that the Debitor ſhould be at Liberty to redeem upon prenominiſhing the Creditor to receive his Money, whilſt at the ſame Time no Faculty whatever is granted to the Creditor of requiring his Money. Theſe Matters are regulated by Conſent of Parties, and neither Law nor Juſtice can interpoſe to alter the ſame: Such *Induciæ* as the Law thinks proper to to give upon every Charge of Horning was allowed to the Petitioner in this Caſe, and further than that he was not entitled.

The only Queſtion therefore is, Whether the Agreement entered into betwixt the Reſpondent and *Caldow* younger when the above mentioned Tack was granted, did ſo bind up the Reſpondent in Favours of the Petitioner that he was no longer at Liberty to force Payment from him of the abovementioned Sum of 1700 Merks, for which he undoubtedly remains bound by virtue of his perſonal Obligation contained in the original heritable Bond for that Sum; or if, by accepting of that Tack, the Reſpondent muſt be underſtood to have paſt from the previous Charge of Horning: So that if Diligence was meant to be uſed for Payment of that Sum, he behoved to proceed *ab ovo*, either by making Requiſition, or by a new Charge.

That any ſuch Thing was communed upon betwixt the Reſpondent and *Caldow* younger, when the above-mentioned Tack was granted, is not alledged, far leſs offered to be proved; and the Reſpondent is at Liberty to declare in the moſt ſolemn Manner, that no ſuch Thing was ever mentioned betwixt them: So that if upon this Account he is to be found liable for Damages in proceeding to execute his Diligence, it is a Misfortune he muſt ſubmit to, from his Ignorance that the Law would conconſtrue

ſtrue the Effect of this Agreement to a different Purpoſe than what was intended betwixt the Parties themſelves.

But whatever Conſtruction this Agreement might admit of, in a Queſtion with *Ireland* younger, it is inconceivable to the Reſpondent how the Petitioner ſhould be entitled to plead Benefit from that Agreement, to which he was no Party, and in which nothing is ſtipulated in his favours.

It can nowiſe influence the preſent Queſtion, that by a private Tranſaction betwixt the Father and Son, *Ireland* younger was bound to relieve the Petitioner of this Debt, becauſe whatever Relief might have been competent amongſt the Co-obligants themſelves, they were equally bound to the Reſpondent; and by no private Agreement amongſt them could the Reſpondent be precluded from the Benefit of that Diligence, which, from the Conception of his Security, was equally competent againſt either of theſe Obligants. And upon this Principle it is, that *eſto* the Reſpondent had by any After-deed paſſed from one or other of theſe Obligants, or reſtricted himſelf indefinitely, or for a limited Time not to uſe Diligence perſonally againſt him, without diſcharging the Debt itſelf, or any ſuch Paction with regard to the other Obligant, it could have afforded no Defence to the Petitioner, ſo long as the Debt itſelf was not diſcharged, though the Reſpondent, by any private Agreement with *Ireland* younger, had reſtrained the Effect of that Diligence ſo far as concerned him perſonally.

The Reſpondent can by no means admit, that he was not at Liberty, notwithſtanding this Tack, to have proceeded in Diligence even againſt *Ireland* younger, in the ſame Manner as if no ſuch Tack had been granted. *Ireland* younger was thereby left at Liberty, as much as before, to pay this Money upon forty Days Premonition, notwithſtanding the Currency of the Tack, whereby that Clauſe in the Tack, allowing the Reſpondent to retain his Annualrents out of the Tack-duty, would of courſe been ſuperſeded: And in like Manner, the Reſpondent was left at Liberty to call for his Money, and to proceed in all legal Diligence for operating his Payment, as if no ſuch Tack had been granted; with this only Difference, that if the Money was allowed to remain in the Hands of *Ireland* younger, the Reſpondent might be at Liberty, if he ſo pleaſed, to retain his Annualrents out of the Tack-duty: So that the Reſpondent is yet at a Loſs to conceive, why, notwithſtanding any thing contained in this Tack, he might not have proceeded at any Time in Diligence for this Money, even againſt *Ireland* younger.

But however an Exception of this Kind might have been competent to *Ireland* younger, it was no Part of the mutual Stipulation betwixt the Reſpondent and *Ireland* younger, upon granting of this Tack, that the Reſpondent ſhould be bound up from uſing perſonal Diligence againſt *Ireland* elder: He was originally bound for the Payment of this Money, and nothing had interveened betwixt him and the Reſpondent, or betwixt the Reſpondent and *Ireland* younger, whereby the Effect of that perſonal Obligation was ſuperſeded. The Charge of Horning was once regularly given, and therefore the Reſpondent was at Liberty to proſecute the ſame, when the Circumſtances of the Caſe ſhould make it reaſonable for him to proceed in further Diligence. What theſe were your Lordſhips have already heard. The Precept of Saſine contained in the heritable Bond was ineffectual: *Ireland* younger was dead, leaving Iſſue but one Infant Son, to whom *Ireland* elder fell to be Tutor at Law; but inſtead of protecting his Infant Grandſon, a Scheme is ſet on Foot, by means of a ſimulate Bond granted to *Corſack*, whereby theſe Lands ſhould be evicted as the Property of *Ireland* elder, to the Excluſion of the prior, but perſonal Right which had been granted to *Ireland* younger, to the Ruin of his Infant Son, and to the Excluſion of all the Creditors of *Ireland* younger. So that upon the whole, as it is not denied that the Reſpondent is at Liberty to inſiſt for Payment of this Money from the Petitioner, in virtue of his perſonal Obligation to pay the ſame, it is hoped your Lordſhips will have no Difficulty to be of Opinion, that the Reſpondent was nowiſe precluded from proceeding in legal Diligence againſt the Petitioner from any thing contained in the aforeſaid Tack betwixt him and *Ireland* younger, and that as the Petitioner was no Party to that Tack. nor any thing thereby ſtipulated in his Favours, he is not intitled to plead Benefit therefrom, or upon that Account to object to the Diligence which in every other Reſpect was legally uſed againſt him for Payment of this moſt juſt Debt.

In reſpect whereof, &c.

ALEX. LOCHART.